

Appeal from two Decisions of the District Manager, Elko (Nevada) Field Office, Bureau of Land Management, dated May 26, 1998, and two Decisions of the Assistant District Manager, Elko Field Office, dated April 2, 1998, requiring the removal of structures and other property, assessment of administrative costs and costs for rent or rehabilitation of lands, and other costs or penalties for trespass on public lands against Carrie and Mary Dann, the Dann Ranch, and the Dewey Dann Estate. N-60788; N-62245; T-NV-010-98-11-005; T-NV-010-91-3-003.

Affirmed.

1. Trespass: Generally

Under 43 C.F.R. § 2920.1-2(a), any use, occupancy or development of the public lands, other than casual use, without authorization, shall be considered a trespass.

"Casual use" includes only short-term noncommercial activity. 43 C.F.R. § 2920.0-5(k). Where the record shows that unauthorized use included long-term grazing and the erection of buildings, it was not casual use. Even though the parties may have used the land under the belief that this was Western Shoshone land and not public land, their good faith is irrelevant to liability for trespass, but may be considered only as to whether the trespass was intentional.

2. Trespass: Measure of Damages

Anyone properly determined by BLM to be in trespass shall be liable to the United States for (1) the reimbursement of all costs incurred by the United States in the investigation and termination of a trespass; (2) the rental value of the lands for the time of the trespass; and (3) either rehabilitation of the lands harmed by the trespass or payment of costs incurred by the United States in so doing.

APPEARANCES: Deborah Schaaf, Esq., Indian Law Resource Center, Helena, Montana, for Appellants; Bruce Hill, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Mary and Carrie Dann (Danns or Appellants), on their own behalf and on behalf of the Western Shoshone Defense Project, the Dann Ranch, and the Dewey Dann Estate have appealed two May 26, 1998, Decisions of the District Manager, Elko (Nevada) Field Office, Bureau of Land Management (BLM), requiring the removal of structures, the assessment of rehabilitation fees and/or rent, and other costs or penalties for trespass within secs. 4, 10, and 34, T. 28 N., R. 49 E., Mount Diablo Meridian (MDM). Consolidated with this appeal from the District Manager's May 26, 1998, Decisions is an appeal by Mary and Carrie Dann from two April 2, 1998, Decisions of the Assistant District Manager, Elko Field Office, in which he determined the Dewey Dann Estate and the Dann Ranch, of which Appellants are partial owners, to be liable for separate amounts of \$66,725.23 and \$288,191.78 for unauthorized livestock grazing, for making improper improvements on public land in the Buckhorn allotment (T-NV-010-98-11-005), and for the unauthorized grazing of livestock apart from the Dewey Dann Estate on public land (T-NV-010-91-3-003). In their identical appeals to both the April 2, 1998, and May 26, 1998, Decisions, Appellants do not deny the grazing or improvements have occurred, but assert their rights as Shoshone Indians to this use of ancestral lands.

On February 19, 1998, BLM issued a Notice of Trespass to each of the Appellants. Each Notice provided, in pertinent part:

The United States of America, through the Bureau of Land Management, Elko Field Office, 3900 E. Idaho St., Elko, Nevada, 89801, has instituted trespass proceedings pursuant to Title 43 CFR § 2920.1-2, under the authority of the Federal Land Policy and Management Act, against certain unauthorized property generally described as semi-permanent structures, tents, abandoned vehicles, corrals, trailers, agricultural products, and other personal property located on the following described lands under the jurisdiction of the Bureau of Land Management.

T. 28 N., R. 49 E., MDM Section 4, N1/2 Section 10, NE1/4NW1/4 T. 29 N., R. 49 E., MDM Section 34, S1/2SW1/4, SW1/4SE1/4

WHEREAS, the existence of said property upon said lands constitutes unlawful trespass and interferes with the proper and efficient management of said lands, and in addition thereto establishes liability to the United States for the unauthorized use and occupancy of said lands.

NOW, THEREFORE, PLEASE TAKE NOTICE that all said property is hereby required to be removed from said land on or prior to 30 days from date of this Notice and in the absence of such removal by such time, the United States, in order to remove public hazard and prevent further trespass upon said land, will without further or any additional notice of any kind whatsoever and without liability take possession, destroy, or remove said property at the owner's expense.

The United States will also take possession of and remove any personal property of value that may be found on the premises, or said land, by the removal date given in this Notice, and will store said personal property, at the owner's expense, at a location to be determined by the authorized officer. Such property may be claimed within 30 days after removal, after payment of trespass liability including storage expenses as may accrue. Failure to claim said property within the specified time will constitute abandonment, and said property shall become the property of the United States.

Failure to remove said property by the removal date and resolve trespass liability may result in trespass penalties and a citation for the owners appearance before a designated United States magistrate who may impose a fine of not more that \$1,000, or imprisonment of not more than 12 months, or both, under Title 43 CFR § 9262.1.

When Appellants failed to remove their property from the public lands or resolve trespass liability within the requisite time, BLM issued trespass decisions. The May 26, 1998, Decisions appealed from, provide in identical language, in pertinent part:

On February 19, 1998, you were advised by personal service of a Notice of Trespass that the United States of America, through the Bureau of Land Management, had instituted trespass proceedings against you for the unauthorized use of public land pursuant to 43 CFR 2920.1-2 under the authority of the Federal Land Policy and Management Act of 1976.

The purpose of the Notice of Trespass was to allow time in which to provide evidence or other information as to why you may not be in trespass as alleged. No information was provided that was sufficient to disprove this allegation.

Accordingly, you will be held liable for fair market value rent of the public lands, costs of removal of semi-permanent structures, tents, trailers, abandoned vehicles, other personal property and unauthorized items, as well as rehabilitation of the lands damaged by your activity, and administrative costs incurred by the Bureau as a consequence of your activity.

(Decision at 1.)

In the April 2, 1998, Order to Remove and Demand for Payment, enumerated as T-NV-010-91-3-003 (April 2 Decision (1)), the Assistant District Manager, Elko Field Office directed Mary and Carrie Dann to remove all unauthorized livestock within 15 days from the South Buckhorn, Geyser, Scott's Gulch, Thomas Creek, and Safford County Allotments in the Elko District, and from portions of the Argenta and Carico Lake Allotments in the Battle Mountain Grazing District. (April 2 Decision (1) at 3.) The Decision also required the removal of all unauthorized improvements made by the Danns in the South Buckhorn Allotment. The removal was to commence within 30 days of the Decision and be completed within 180 days. Id. at 4.

Finally, this Decision demanded payment of \$288,191.78 to the United States within 30 days as a fee due for willfully grazing livestock on public lands without authorization. Id.

In a second April 2, 1998, Order to Remove and Demand for Payment, enumerated as T-NV-010-98-11-005 (April 2 Decision (2)), issued to the Dewey Dann Estate and Dann Ranch c/o Carrie Dann, Mary Dann, Richard Dann, Clifford Dann, Toni Steve, and Lori Steve, the Assistant District Manager, Elko Field Office, made the same two demands of the Dann Ranch and Dewey Dann Estate with respect to the removal of cattle and improvements as he had of Mary and Carrie Dann in the April 2 Decision (1) above. (April 2 Decision (2) at 3.) The only difference was that the payment demanded within 30 days of the Dewey Dann Estate and the Dann Ranch was in the amount of \$66,725.23. Id.

In their Statements of Reasons (SOR) for appeal to the Board, which are identical in each case, Appellants do not assert that their cattle were not grazing at the times and places alleged, nor do they claim that the range and other improvements cited had not been constructed. Appellants also make no claim that they had any authorization from BLM to graze or construct improvements on the public land. Rather, Appellants claim in their SOR that they "do not accept that the Western Shoshone people have freely entered into a relationship of trusteeship with the United States by which the United States may validly dispose of Western Shoshone lands and resources or interfere with Western Shoshone traditional cultural practices without Western Shoshone consent." (SOR at 2.) Appellants claim the United States fiduciary obligation toward the Western Shoshone must be evaluated in light of the 1863 Treaty of Ruby Valley, 18 Stat. 689, which they claim obligates the United States to acknowledge and respect Western Shoshone land use patterns. (SOR at 3.) The Danns claim that international human rights law to which the United States is bound obligates the United States to safeguard all aspects of indigenous peoples' cultures, including those aspects related to land use and productive economic activities. Id.

Appellants claim that in light of the United States' legal responsibilities, the Decisions appealed from are contrary to the fiduciary responsibilities to which BLM is obligated on behalf of the Western Shoshone. (SOR at 4.) In that regard, the Danns argue that these Decisions are part of a concerted effort by BLM officials to prevent Western Shoshone people

from using Western Shoshone ancestral lands for cultural and spiritual practices and in accordance with land tenure patterns. Id. Further, the Damns claim that the structures and other personal property that are the subject of these Decisions are part of ceremonial areas used by the Western Shoshone since time immemorial and are integral to their traditional cultural and spiritual practices. Id. Finally, Appellants claim that "[t]he BLM is engaged in a pattern of conduct that would deprive them of their cultural and spiritual identity as Western Shoshone, break their cultural bonds with the land that sustains them, and destroy them as Indian people." Id.

In response, BLM claims that it "fully recognizes its responsibilities toward the Tribes." (Response to Petitioner's Reply (Response) at 1.) It points out, however, that tribal land is neither directly nor indirectly implicated in these Decisions, and no recognized Tribe has made an appearance in these appeals. BLM states that Appellants refuse to recognize that these are public lands, and they feel no compulsion to seek authorization from BLM to use these lands. (Response at 2.) BLM further urges that the Department of the Interior's trust responsibility "certainly cannot be read to include allowing individual tribal members to illegally occupy public lands." Id.

An understanding of the history of the Western Shoshone claims is helpful in addressing the issues related to Appellants. In 1945, Congress passed the Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. §§ 70-70V (1963 and Supp. 1982), "to dispose of the Indian claims problem with finality." H.R. 1466, 79th Cong., 1st Sess., at 10 (1945). The Act gave the Commission jurisdiction to render damage awards for the taking of aboriginal title. The Western Shoshone claim, brought before the Commission in 1951 by the TeMoak Band, was based upon the loss of title to lands in Nevada, California, Colorado, Idaho, Utah, and Wyoming and included the land described in the Treaty of Ruby Valley, supra, entered into in 1863 between the United States and the Western Bands of Shoshone Indians.

In Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387, 416 (1962), the Indian Claims Commission held that the aboriginal title of the Western Shoshone land had been extinguished in the latter part of the 19th century.

In a subsequent decision, the Commission awarded the Western Shoshone Indians in excess of \$26 million. Western Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 318 (1977). In 1979, the Court of Claims affirmed this award in TeMoak Band of Western Shoshone Indians v. United States, 219 Ct. Cl. 346, 593 F.2d 994. On December 6, 1979, the Clerk of Court certified the award to the General Accounting Office. This act of certification caused the automatic appropriation of the amount of the award, which was deposited in an interest bearing account in the Treasury of the United States. The act of certification provided that the Secretary of the Interior, in consultation with the Western Shoshone, would provide a plan for the payment of the money. To date, the Western Shoshone have refused to cooperate in formulating a plan or in accepting the money.

In a case nearly identical to the case now before the Board, the United States brought a trespass action against the same Dann sisters in 1974 for grazing livestock on public land without the necessary grazing permits. The Dann sisters claimed aboriginal title to the land. The United States District Court for the District of Nevada ruled against the Dams, ruling that aboriginal title had been extinguished by the Indian Claims Commission's judgment in 1962. The Ninth Circuit disagreed and reversed the District Court, holding that the extinguishment question had not been decided. United States v. Dann, 572 F.2d 222 (9th Cir. 1978). On remand the District Court held that aboriginal title had in fact been extinguished when the final award of the Commission had been certified for payment and deposited in a trust account for the Western Shoshone. On a second appeal, the Ninth Circuit again reversed, holding that the title had not been extinguished because "payment" had not been actually "received" by the Western Shoshone, although it had been placed in the possession of the Secretary of the Interior in a trust account. United States v. Dann, 706 F.2d 919 (9th Cir. 1983).

The United States Supreme Court granted certiorari "to resolve the question of whether the certification of the award and appropriation under § 724 constitutes payment under §22(a)." United States v. Dann, 470 U.S. 39, 44 (1985). The Supreme Court reversed the Ninth Circuit decision and held that, "Once the money was deposited in the trust account, payment was effected." Id. at 50. The Supreme Court remanded the matter to the Ninth Circuit. The Ninth Circuit, noting that the Supreme Court had spoken, reversed its prior decision and declared: "Now that the Supreme Court has made clear that the Western Shoshone claim has been paid, we cannot avoid the rule of Gemmill that payment for the taking of a [sic] aboriginal title establishes that the title has been extinguished." United States v. Dann, 873 F.2d 1189, 1194 (9th Cir. 1989). The Ninth Circuit then proceeded to find that the most appropriate date for the extinguishment of tribal title was July 1, 1872, id. at 1198, and that individual Indians could not claim grazing rights under a treaty where the treaty was between the Government and the tribe, and the treaty did not confer individual rights. Id. at 1200. The Ninth Circuit concluded that "[p]ayment of that claim bars the Dams from asserting the tribal title to grazing rights just as clearly as it bars their asserting title to the lands." Id.

Subsequent to the 1989 Ninth Circuit Decision, the Ninth Circuit denied a claim by the Western Shoshone National Council and individual Western Shoshone members that "the Treaty of Ruby Valley operates as an independent source of hunting and fishing rights and that those rights survive the Shoshone Nation litigation." Western Shoshone National Council v. Molini, 951 F.2d 200, 202 (9th Cir. 1991), cert. denied, 506 U.S. 822 (1992). The Ninth Circuit upheld summary judgment against the Western Shoshone National Council in that case, finding all issues relating to title had been resolved in the Dann litigation. Id. at 201.

[1, 2] The Dams have once again raised these same issues on appeal. We find they have been finally determined by the Supreme Court in United

States v. Dann, supra. Moreover, under 43 C.F.R. § 2920.1-2(a), any use, occupancy or development of the public lands, other than casual use, without authorization, shall be considered a trespass. "Casual use" includes only short-term noncommercial activity. 43 C.F.R. § 2920.0-5(k).

Where the record shows that unauthorized use included long-term grazing and the erection of buildings, it was not casual use. Even though the parties may have used the land under the belief that this was Western Shoshone land and not public land, their good faith is irrelevant to liability for trespass, but may be considered only as to whether the trespass was intentional. See Michael and Karen Rogers, 137 IBLA 131, 134 (1996). Anyone properly determined by BLM to be in trespass shall be liable to the United States for (1) the reimbursement of all costs incurred by the United States in the investigation and termination of a trespass; (2) the rental value of the lands for the time of the trespass; and (3) either rehabilitation of the lands harmed by the trespass or payment of costs incurred by the United States in so doing. 43 C.F.R. § 2920.1-2(a)(1)-(3).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions of May 26, 1998, and April 2, 1998, finding Appellants in trespass, demanding removal of livestock and improvements, and assessing damages are affirmed.

James P. Terry
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge